91-1904

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONARD L. FINZ,

Petitioner,

against

STUART A. SCHLESINGER; JULIEN, SCHLESINGER AND FINZ, P.C.; JULIEN AND SCHLESINGER, P.C.; JULIEN AND SCHLESINGER; STUART A. SCHLESINGER, doing business as Julien and Schlesinger P.C.; THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND; THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST; PLAN DOE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN E. FROWLEY
Counsel of Record
225 Broadway
New York, NY 10007
(212) 233-8674

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1992 TERM

- - - - - - - - - - - - - - - - -x

LEONARD L. FINZ,

Petitioner,

-against-

STUART A. SCHLESINGER: JULIEN, SCHLESINGER AND FINZ, P.C.; JULIEN AND SCHLESINGER, P.C.; JULIEN AND SCHLESINGER; STUART A. SCHLESINGER, doing business as Julien and Schlesinger P.C.; THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND; THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST; PLAN DOE,

Respondents.

- -x

QUESTION PRESENTED

1. Did the United States Court of Appeals for the Second Circuit deny to plaintiff Leonard L. Finz equal protection and due process of law by construing provisions of the Employee Retirement Income Security Act, 29 USC §§1001 et seq (1988) so as to deprive him of pension benefits to which he may be entitled, because he is well-educated, and to

exclude him from the disclosure-requirements protection afforded all other employees under ERISA?

LIST OF PARTIES

The parties involved in the case before this Court are as follows:

Plaintiff-Appellant in the Second Circuit Court and petitioner here	Leonard L. Finz
Defendants-Appellees in the Second Court of Appeals and respondents herein	Stuart A. Schlesinger Julien, Schlesinger and Finz, P.C.: Julien and SchlesingerP.C. Julien and Schlesinger; Julien and

Schlesinger P.C.; The Julien and Schlesinger Employee Retirement Fund; The Julien and Schlesinger P.C. Employees Retirement Trust; Plan Doe.

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PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Second Circuit Court of Appeals is reported as Finz v. Schlesinger at 957 F2d 78 (1992) and is reprinted in the Appendix to this Petition at pages 40-51. The opinion of the lower courts are reprinted at pp. 52-75 of the Appendix.

Jurisdiction

The order of the Second Circuit Court of Appeals was entered February 25, 1992. This Court has jurisdiction under 28 USC § 1254 (1).

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State...shall...deprive any person of life, liberty or property, without due process of law; not deny to any person within its

jurisdiction the equal protection of the laws."

Also involved are 29 USC Section 1132(c), 29 USC § 1104 and 29 USC §§ 1021-1027.

Introduction

The issue presented in this case is whether the petitioner is entitled to the protections afforded all employees under 29 USC §§1001 et seq (1988) ("ERISA"), or whether he is to be treated differently under ERISA from all other employees because he is "well-educated."

Under the decision of the Court below, petitioner Leonard L. Finz was deprived of the protections of ERISA because he was a former New York State Supreme Court Justice and was "well-educated". He was also found to have waived his rights afforded him under ERISA because he supposedly understood the terms of

an exiting agreement entered into between himself and the law firm in which he had been an employee; an agreement which addressed the question of ERISA benefits and in which repondents (Finz's employers) represented to Finz that Finz had no ERISA benefits available to him.

Several years after signing this exiting agreement Finz discovered that the respondents had committed fraud in that their representations to him at the time of the signing of the exiting agreement were patently false. There was a firm pension plan, covering Finz, in existence at the time the agreement was signed and there evidently were plan benefits accumulated in Finz's name. However, since the partners in the respondent law firm had assured Finz he was not entitled to any benefits under any firm plan and had not disclosed the details of any plans to him,

Finz signed the exiting agreement, confident that respondents were acting in good faith.

The gravamen of petitioner's position is that regardless of his level of education petitioner should have been entitled to disclosure under ERISA of the plan and benefits available before he was adjudicated to have waived his ERISA rights. The lower court specifically found that defendants (respondents herein) by "repeatedly ignoring Finz'z requests for plan documents, shirked their responsibility" in regard to disclosure. However, the Court held that defendants' (respondents') failure to provide Finz with a summary plan description did not nullify his waiver because Finz, "an astute lawyer," knew exactly the bargain he was making.

In so holding, the Court drew a bright line, creating and distinguishing a new class of employees to whom ERISA's disclosure

requirements do not provide protection, i.e., those employees who are "well educated". That this was the precise intention of the Court-to create this subclass of employees-is clear from the language of the Second Circuit's decision:

> "We do not intend to suggest that a plan trustee's failure to turn over requested plan documents to a potential participant could never, in and of itself, nullify a waiver executed by a potential plan participant. Where, for example, application of the Laniok factors indicate that there is a great disparity in the education or the bargaining power of the parties, the plan trustee's failure to provide a potential participant with requested information could be dispositive.

> Indeed, we believe that once a potential plan participant demands a summary plan description from a plan trustee; a heavy burden should be placed on the trustee to show whether the information was provided and, if it was not, give a detailed explantation why it was not furnished. (Our Emphasis).

But since Finz was an "astute" lawyer he was not entitled to disclosure under ERISA , according to the Circuit Court, and could be said to have waived his ERISA benefits without having been the recipient of such disclosure.

We believe the decision below runs counter to the very purpose of ERISA, which was to protect the "well being and security c ...employees and their dependents...affected by these [pension] plans to ensure that disclosure be made and safeguards provided

with respect to the establishment, operation and administration of such plans..." [29 USC §1001 (a); see also Firestone Tire and Rubber Co. v. Bruck, 109 Sup Ct. 948 (1989)].

Statement of the Case

In or around December of 1977, Leonard Finz was approached by Alfred S. Julien (now deceased) and Stuart Schlesinger and was asked to join the law firm of Julien & Schlesinger, P.C. as a trial attorney (107a). Mr. Finz, then a Justice of the New York State Supreme Court, was concerned about the loss of security previously afforded by his public service employment, and thus inquired about whether the firm had a pension plan (108a). He was assured by Mr. Schlesinger that as an employee of the firm, he would be a participant of a pension plan then already in place for firm employees (Id).

Partly upon the strength of this representation, Mr. Finz resigned from the bench in January 1978 and joined the firm, the name of which was changed to Julien, Schlesinger & Finz, P.C. (Id).

Towards the end of 1983, the year when, according to Schlesinger, Finz's pension benefits were to vest, Mr. Finz raised with Mr. Schlesinger the issue of the pension (109 a). The latter refused to discuss the matter and refused to disclose the details of any pension plan sponsored by the firm. The dispute which ensued over the existence of a pension covering Finz eventually resulted in Mr. Finz's decision to leave the firm on April 10, 1984 and join in partnership with Michael Wolin, formerly the managing attorney for the firm (of Julien, Schlesinger and Finz, P.C.) (109a).

An exiting agreement encompassing many issues including the pension, was drafted by one David Jaroslawicz, a former employee of Julien & Schlesinger and confidant of defendant-appellee Mr. Schlesinger (113 a). Mr. Finz discussed those provisions of the exiting agreement which dealt with the pension with Wolin who assured him that neither he (Wolin) nor Finz had ever had any pension rights with the firm (113a, 114a).

Plaintiff signed the exiting agreement on May 4, 1984. The exiting agreement, in pertinent part, contains representations made by appellees that neither Wolin nor Finz ever had any interest in any pension fund or plan issued by the firm. These written representations were made in particular by, among other persons, Stuart Schlesinger and Michael Wolin (37a).

The agreement also recites Mr. Finz's representation that "to his knowledge" he was neither issued, nor did he ever receive any interest in the aforementioned retirement fund or any other plan which may have existed and from which he, Finz, as an employee would have been entitled to receive benefits (38a).

The parties agreed in the exiting agreement to "resolve, settle and compromise their differences" regarding the supposed pension plan "as evidenced by general releases executed by LLF (LEONARD L. FINZ) and the remaining parties to this Agreement as consideration therefor, annexed hereto as Appendix A" (38a).

The releases, signed in conjunction with the agreement, were standard form general releases. Those executed by Mr. Finz, as pertinent, release "Alfred S. Julien and Stuart A. Schlesinger, as Trustees of the 'Julien & Schlesinger Employee Retirement Fund Dated June 11, 1974' and any other persons who may have been Trustees at any other time of the 'Julien & Schlesinger Employee Retirement Fund Dated June 11, 1974'," "in consideration of the sum of one dollar and other good and valuable consideration" received from those aforementioned named (and unnamed) parties (43a); and release the "'Julien & Schlesinger Employee Retirement Fund Dated June 11, 1974' and/or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of Julien, Schlesinger & Finz, P.C. or Julien & Schlesinger P.C." (44a), in consideration of

the sum of "one dollar and other good and valuable consideration" received from the "Julien & Schlesinger Employee Retirement Fund dated June 11, 1974" (44a).

Michael Wolin likewise released the "trustees" and the supposed "plans" for "one dollar and other good and valuable consideration" (46a, 48a).

Another release (contained within Appendix "A" to the agreement) was given by Mr. Finz personally and on behalf of his own law office (The Law Offices of Leonard L. Finz) to Alfred Julien, Stuart Schlesinger, Julien, Schlesinger & Finz, P.C. and Julien & Schlesinger P.C. (45a).

In addition to resolving any differences the parties may have had regarding Mr. Finz's pension rights, the agreement (a) addressed appellant's claim he was entitled to a stock or equity interest in the Schlesinger law office's lease, files, equipment and furniture (36a-37a); (b) provided a mechanism by which cases previously referred to the Schlesinger firm by Finz would be handled in the future (39a-41a); (c) expressed covenants holding the parties mutually harmless for any claims made against files handled by the other (see 40a); and (d) provided that Mr. Finz would assume the full financial responsibility for an automobile which the Schlesinger firm had previously leased for appellant's use (41a-42a).

The agreement also recorded an acknowledgement by defendants that, between January 1, 1984 and the date of the agreement,

they had deposited $28,000, which had been withheld as taxes on behalf of appellant and that they would issue to him a W2 form indicating the withholding of that sum (39a).

In a separate numbered paragraph of the agreement it was stated:

> 11. At the time of the execution of this AGREEMENT and upon the execution of the general releases required, copies of which are annexed hereto as Appendix "A" to this Agreement, ASJ, SAS, JS&F and J&S will jointly pay a total sum of $75,000 to LLF (39a).

Finally, in paragraph 3 of the agreement the parties agreed

> "...to fully cooperate with each other in any litigation or claim being brought or asserted against any of the parties individually

and/or the firms, by third parties arising out of matters handled by any of them, without seeking renumeration from the other" (36a).

In July 1989, while Mr. Finz was moving his offices, he discovered a photostat of a check dated November 3, 1983 payable to Michael Wolin and drawn by Stuart Schlesinger on the account of "Julien & Schlesinger, P.C. Employees Retirement Trust" (116a, 119a). This proved that Wolin and defendants, specifically Mr. Schlesinger, had been untruthful when they represented to appellant that no pension plan existed covering Wolin and Finz (116a).

The Instant Lawsuit

On or about April 20, 1990 plaintiff commenced the present action by service of a complaint alleging, in part, that defendants in violation of their fiduciary duties

defrauded plaintiff by wrongfully representing he was not entitled to benefits under the Schlesinger firm's plan (e.g. Compl. Para 75, 17a), and "had no vested interest in the plan" (e.g. Compl Para 76, 17a), and by failing to give him a summary description of the plan, although he requested one (e.g. Compl Paras 69, 70, 77-78, 16a-17a).

Plaintiff alleged, in addition, that he was fraudulently misled into signing the settlement agreement and releases (e.g. Compl, paras 88-89, 19a) and was never given the benefits to which he was entitled under the plan (e.g. Compl para 90, 19a).

Discovery Demands

On or about June 6, 1990 plaintiff served on defendants a discovery demand requesting production, inter alia, of "a real and true copy of all pension and/or retirement plans maintained by Defendants, either jointly or

individually during the time that plaintiff was employed by defendant(s)" (65a). He also served a notice seeking the deposition of Stuart Schlesinger (61a).

The Original Motion

Rather than respond to the Demand and Notice defendants moved on June 12, 1990, for dismissal or, in the alternative, summary judgment and to stay all discovery (23a et seq.).

In support of their motion defendants argued Mr. Finz had released his pension rights by signing the releases and agreement dated May 4, 1984. Mr. Schlesinger stated in his affidavit in support of the motion that Finz had been represented by counsel during the "negotiations" concerning the exiting agreement (31a), and in exchange for dropping his claim for pension benefits, Finz was given $75,000 and the right to purchase a Mercedes

automobile for one dollar, as well as the right to be substituted as counsel in a number of cases (31a). Schlesinger claimed appellant was aware "of his purported claims" concerning the pension. He noted Mr. Finz had testified in an unrelated proceeding as follows (31a-32a):

> Q. Now after those four years expired, did you receive any document extending your employment?
>
> A. No, I did not.
>
> Q. Now, when was it, sir, that you decided that you were going to leave the Julien firm?
>
> A. When the pension that I was entitled to was taken away from me--
>
> Q. I'm asking for a date.
>
> A. Well, I don't know (59a).

Schlesinger also pointed to the following language of the exiting agreement:

"[Plaintiff] states that to his knowledge and during or prior to the period of his employment with [defendant], he was neither issued, nor did he receive any stock interest in the 'JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974' or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [Defendants], which [Plaintiff] claims was in existence during the period of his employment with [Defendants] and as such is or was entitled to the benefits thereunder provided as a covered employee.

"[Defendants] deny that [Plaintiff] is entitled to any stock

interest or equity interest whatsoever with regard to the 'JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974' or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [Defendants], as hereinabove claimed by [Plaintiff] in this paragraph.

"As a consequence of the dispute which exists based upon the claims made by [Plaintiff] and the denials of those claims by [defendants] as set forth in this paragraph, the aforenamed [plaintiff and defendants] hereby resolve, settle and compromise their differences as evidenced by the general releases executed by [plaintiff] and the

> remaining parties to this Agreement as consideration therefore, annexed hereto as Appendix 'A.'".

He claimed this language and Mr. Finz's non-responsive testimony in an unrelated trial unequivocally showed that he knew he was entitled to pension benefits at the time he signed the releases (32a).

In a memorandum of law defendants claimed plaintiff's action was time barred and that the plain language of the settlement agreement demonstrated there was no merit to plaintiff's fraud cause of action (e.g. 72a, 82a).

Opposition to Motion

In opposition to the motion appellant averred in his affidavit the circumstances surrounding his execution of the releases and agreement (107a et seq). He explained that the $75,000 payment, which in the agreement seemed unrelated to any of the claims being

made, was in fact payment of the balance of a bonus which Mr. Schlesinger had promised him for 1983 (110a). The Mercedes lease was turned over to him and he assumed full financial responsibility for the car which the firm had previously leased for him. He thus afforded the firm a way out of its arrangement with the leasing company without penalty of any kind (e.g. 111a). He relieved the firm of the burden of $27,000 in continuing lease payments as well as the cost of insurance for the remaining 19 months on the lease (111a). The cases transferred to appellant were those which he had previously referred to the Schlesinger firm. The Schlesinger firm retained a judicial lien on these files and thus Mr. Finz received from the firm nothing to which he would not otherwise have been entitled under the law. Upon obtaining a signed consent to change attorneys from his

clients appellant would have received exactly what he was "given" under the agreement (112a).

In any event, neither Mr. Finz's assumption of the Mercedes lease or the transfer of cases to him were related to appellant's release of pension rights. He asserted that he had been assured he had no pension rights, and that he had no actual knowledge when he signed the agreement that there was in fact in existence a pension plan covering him (113a). If he knew there was such a plan he would never have signed the releases and agreement (113a). He did not believe that Schlesinger would be committing a fraud in writing when that party represented that Finz was not entitled to any pension (114a). Appellant assumed that if Wolin, the managing attorney of the firm, was not covered, neither was he (114a). In making the

misrepresentations in the agreement as to Finz's entitlement to pension benefits, the employer had demonstrated his lack of "good faith" (115a). The releases were therefore invalid (Id).

The Court's Decision of December 10, 1990

In pertinent part the District Court concluded on the motion that:

> "In arguing that Finz's complaint is barred by the agreement and releases, defendants fail to recognize that an alleged fraudulent denial of participation in a plan is fundamentally different from a denial in good faith, grounded in reasoned interpretation and application of the terms of the plan. Finz alleges that he relied on defendants' representations that he was not covered under the plan,

assuming that those representations were made in good faith he alleges further that he relied on the representation that Wolin was not covered under the plan. The check to Wolin suggests, however, that defendants may have been falsely concealing the fact that Finz was covered under the plan. Because Finz was aware at the time he signed the agreement and releases of the alleged misrepresentations by the defendants and of the alleged fraud surrounding the check to Wolin,

Finz's complaint is not barred by the agreement and releases see, e.g., Irving Trust Co. v. Deutch, 73 F2d 121, 126 (2d Cir 1934) (general release executed in settlement of contract claims did not bar suit for unrelated, unknown fraud claims), cert. denied, 294 U.S. 708 (1935) (cited in Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F2d 523, 528 (2d Cir. 1985) (253a).

Motion to Reargue

Defendants moved to reargue (212a et seq) "with reluctance" (216a) arguing they did not conceal plaintiff's ERISA "claim" (219a), and

that the Court supposedly ignored plaintiff's own statements in the agreement purportedly indicating plaintiff's disbelief of defendant's misrepresentations (see 220a).

The Decision of June 6, 1991

Upon "reconsideration" the District Court concluded in relevant part that the settlement agreement's language constituted an admission by Finz that despite defendants' alleged misrepresentations Finz still "believed" he was "entitled to benefits under defendants' retirement plan" (274a). As the lower court

went on to reason with respect to plaintiff's common law fraud cause of action, "because Finz cannot establish reliance upon defendants' alleged fraud, defendants are entitled to summary judgment on Finz's fraud claim" (274a).

In addition, the Court found the releases Finz signed were "clear and specific"; that Finz, as a practicing attorney and former judge "was adequately aware of his legal rights" and that even if he was unfamiliar with ERISA had the "opportunity to consult with counsel"; that he clearly had the "opportunity for negotiation, at least from the time Finz left defendants' firm in the beginning of April to the signing of the releases in early May"; and that to the extent Finz was not adequately informed as to the details of the ERISA plan, he waived his right

to be so informed when entering into the settlement agreement" (274a).

The Court also concluded the $75,000 received by Finz, the assumption of a lease for and the acquisition of the option to purchase a Mercedes previously leased for Finz's use by the Schlesinger firm and the transfer to Finz of cases Finz had previously referred to the Schlesinger firm constituted adequate consideration for the release of Finz's pension rights. The Court found the release and settlement agreement unambiguous and would not consider as parol evidence Finz's explanation that the $75,000 paid to him was in actuality the remainder of a $100,000 bonus promised to him for the year 1983, and his further arguments that assumption of the Mercedes lease and the transfer of cases to him did not constitute consideration of any kind under the

circumstances and certainly did not constitute valuable consideration for release of his pension benefits (see 277a-278a).

The Decision of
The Second Circuit Court
of Appeals

The Court below analyzed the circumstances under Laniok v. Advisory comm. of Brainerd MFG Co. Pension Plan, 935 F2d 1360, 1365 (2d Cir 1991) and found that no individual can waive his or her right ot paricipate in a pension plan governed by ERISA only if his orher waiver "is made knowingly and voluntarily; Laniok, 935 F2d at 1365.

It concluded that because "the primary purpose of [ERISA] is the protection of individual pension rights... [citation ommited]... it is only logical that a pension plan's trustees owe at least some duty to a potential plan participant to

facilitate the determination of whether he or she has rights under the plan."

It went on to hold, however, that where, as here, the potential plan participant is well-educated, the failure of the trustees to disclose does not negate the waiver.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF EQUAL PROTECTION AND DUE PROCESS BY ARBITRARILY AND IRRATIONALLY EXCLUDING PETITIONER FROM THE CLASS OF PERSONS AFFORDED THE PROTECTION PROVIDED BY THE RIGHT OF DISCLOSURE UNDER ERISA.

The ruling below, in construing an otherwise constitutional statute, created a subclass of employees to whom the "disclosure" protections of ERISA do not apply. The statute (ERISA), we submit, was intended to apply to all employees regardless of education or background. All

employees were to be afforded the protection provided by the requirement of disclosure. Once disclosure is made an employee can be said to have made a knowing and intelligent waiver of his ERISA rights.

Without disclosure an unscrupulous employer can defraud the employee and if the employee is "educated"-under the lower court's ruling-he can avoid the consequences of his fraud by pointing to the waiver.

The Court has long recognized that a law may have no impermissible classification by its own terms, but it may be applied in such manner as to create a new classification. The Court will then test the law in its application to determine whether the new classification established is permissible. See e.g. Yick Wo v. Hopkins, 118 US 356, 65 Ct 1064, 302 LEd 220 (1886).

Normally, in determining whether a class challenged as violating equal protection is rationally related to a legitimate purpose this Court must answer: (1) whether the legislation has a legitimate purpose, and (2) whether it was reasonable for the lawmaker to believe that use of the challenged class would promote that purpose. See Western & Southern Life Ins. Co. v. State Bd of Equalization, 451 US 648, 68 LEd 2d 514, 101 S Ct. 207 (1981).

In this instance, ERISA was enacted for the purpose of protecting "the well being and security of ....employees and their dependents ....affected by these [pension] plans, to ensure that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such plans..." [29 USC § 1001 (a)]. As the Supreme Court held in Firestone Tire and

Rubber Co. v. Bruch, 109 Sup Ct. 948 (1989), the purpose of ERISA's reporting and disclosure requirement is to allow "the individual participant [to] know exactly where he stands with respect to the plan [Id][5]. Numerous and detailed provisions of ERISA mandate that plan beneficiaries have available to them complete and accurate information regarding the plan. The law specifies that complete plan descriptions and annual reports must be provided to all plan beneficiaries and filed with the Department of Labor for public inspection [29 USC §§ 1021-1027]. All relevant information must be provided to a participant and beneficiary upon demand [29

USC § 1132 (c) (1) (b)]. If such information is not provided penalties are to be imposed [Id].

Rather than protect the employee and his family from improvidently bargaining away any benefits provided by any plans qualified under ERISA-- the intent of congress in enacting ERISA [Senco of Florida Inc. v Clark, 473 F Supp 902 (M.D. Fla 1979)]-- the lower court's decision, in effect, protects the fiduciary who assiduously stonewalls the employee by refusing to disclose information concerning the plan. The holding, in practical terms, releases the fiduciary from the burden to disclose in the first instance and places the burden with respect to disclosure upon the employee - who is required to "press"

for disclosure before signing the release in order to avoid waiving his right to be informed. The intent of Congress would be hindered by the imposition of such a burden on the employee. Congressional intent, we submit, would be completely thwarted by any holding that a plaintiff under these circumstances is deemed to have waived his right to disclosure by signing the release. Such would encourage employers not to disclose. Once an employer had persuaded his employee to sign a release the employer could claim the employee, by signing, had waived his right to be better informed. This clearly provides no protection to the employee. Indeed, we submit, the lower

court's holding directly contradicts the intention and spirit of ERISA.

In essence, the Court on its own revised or restricted permissible legislation, which it had no constitutional right to do. See in re Lawyers Westchester Mort & Title Co., 288 NY 40, 41 NE2d 449, cert den. 317 US 701, 87 LEd 560, 63 S Ct. 527 (1942) (Courts may not revise or restrict legislation.); Order of R. Telegraphers v. Chicage & NWR, Co., 362 US 330 , 4 LEd 2d 774, 80 S Ct 1056 (1962) (Courts may not create exceptions to a legislative plan.); People v. Crane, 214 NY 154, 108 NE 427, aff'd 39 US 195, 60 LEd 218, 36 S Ct 85 (1915) (Questions of policy are for determination by the legislature and not the courts.); Mathews v. DeCastro, 429 US 181, 50 LEd 2d 389, 97 S Ct 431 (1976) (Courts cannot properly be concerned with

reasons that prompted legislature in creating classification.)

In applying a constitutional statute the Court created a wholly arbitrary and thus unconstitutional classification, contrary to the explicit policy expressed by the Congress in enacting ERISA. That policy was to afford protection through disclosure to all employees regardless of educational status.

CONCLUSION

For the foregoing reasons, the petition for a srit of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

NORMAN E. FROWLEY
Appellate Counsel for
Petitioner
Law Offices of
Leonard L. Finz, P.C.
Counsel of Record for
Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 585—August Term, 1991

(Argued: December 3, 1991 Decided: February 25, 1992)

Docket No. 91-7692

LEONARD L. FINZ,

Plaintiff-Appellant,

—v.—

STUART A. SCHLESINGER, JULIEN, SCHLESINGER AND FINZ, P.C., JULIEN AND SCHLESINGER, P.C., JULIEN AND SCHLESINGER, STUART A. SCHLESINGER D/B/A JULIEN AND SCHLESINGER P.C., THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND, THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST, and PLAN DOE,

Defendants-Appellees.

Before:

TIMBERS, MINER and ALTIMARI,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York (Kenneth Conboy, *Judge*), granting defendants-appellees' motion for summary judgment and dismissing plaintiff-appellant's ERISA, common law fraud and common law conspiracy claims.

Affirmed.

NORMAN E. FROWLEY, New York, NY (Law Offices of Leonard L. Finz, P.C., New York, NY, of counsel), *for plaintiff-appellant.*

GARY P. NAFTALIS, New York, NY (Jonathan M. Wagner, Kramer, Levin, Nessen, Kamin & Frankel, New York, NY, of counsel), *for defendants-appellees.*

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant Leonard L. Finz appeals from a judgment entered in the United States District Court for the Southern District of New York (Kenneth Conboy, *Judge*), granting defendants-appellees', Julien, Schlesinger and Finz, P.C., Julien and Schlesinger, P.C., Julien and Schlesinger, Stuart A. Schlesinger d/b/a Julien and Schlesinger P.C., The Julien and Schlesinger P.C. Employees Retirement Trust, The Julien and Schlesinger Employee Retirement Fund, and Plan Doe (collectively "defendants"), motion for summary judgment and dismissing the complaint against them. Finz initiated the underlying action against defendants, claiming, among other things, that they unlawfully deprived him of pension

benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (1988) ("ERISA"). Specifically, Finz contended that defendants wrongfully led him to believe that he was not covered by Julien & Schlesinger's retirement plans and thus fraudulently induced him to sign a waiver releasing them from liability for payments under these plans.

The district court rejected Finz' argument, concluding that it was clear from Finz' waiver that he understood he might have been covered by the pension plan, but had nevertheless waived his claims. Thus, the district court found that he could not maintain his action for damages under ERISA. The court also dismissed his common law claims of fraud and conspiracy on this basis.

For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

In January 1978, Leonard L. Finz, who was then an acting New York State Supreme Court Justice in Queens County, left the bench and joined the law firm of Julien & Schlesinger, P.C., as a trial attorney. Thereafter, the firm's name was changed to Julien, Schlesinger & Finz, P.C. According to Finz, he was induced to enter private practice, in part, because he wanted a guaranteed pension. For approximately seven years Finz worked for the firm as a trial attorney.

On April 10, 1984, Finz left the firm and formed a partnership with Michael Wolin, the former managing partner of Julien & Schlesinger. Finz alleges that he left the firm over a conflict with defendants concerning his eligibility for pension benefits.

Subsequently, on May 4, 1984, Finz entered into an agreement with defendants designed to resolve his differences with them amicably and to avoid litigation over any potential claims. The agreement addressed Finz' claims regarding pension benefits, as well as his rights as to various clients and his allegation that he was entitled to a stock and equity interest in the firm. With regard to Finz' pension claims, the agreement specifically stated:

> [Finz] states that to his knowledge and during or prior to the period of his employment with J & S or J S & F, he was neither issued, nor did he receive any stock interest in the "JULIEN & SCHLESIGNER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of J S & F and J & S, which [Finz] claims was in existence during the period of his employment with J S & F and as such is or was entitled to the benefits thereunder provided as a covered employee. . . .
>
> As a consequence of the dispute which exists based upon the claims made by [Finz] and the denials of those claims by [Julien, Schlesinger,] J S & F and J & S as set forth in this paragraph, the aforenamed [Julien, Schlesinger,] J S & F and [Finz] hereby resolve, settle and compromise their differences as evidenced by the general releases executed by [Finz] and the remaining parties to this Agreement as consideration therefore, annexed hereto as Appendix "A."

Agreement ¶ 8. Finz was paid $75,000 upon execution of the entire agreement and the general releases annexed to it. Agreement ¶ 11. In the same agreement, Michael Wolin, Finz' partner, agreed that he did not have any

stock ownership interest in the firm or in the firm's pension plan.

Approximately five years later, in July 1989, Finz discovered a photocopy of a check made out to Michael Wolin dated November 4, 1983 and drawn on the account of "Julien & Schlesinger, P.C. Employees Retirement Fund." Because Finz assumed that he had been in the same position as Wolin with regard to the firm's pension plan, Finz once again began to assert that he had been fraudulently deprived of his retirement benefits.

Accordingly, Finz initiated the underlying action against the defendants, claiming that they had deprived him of pension benefits in violation of ERISA. Additionally, Finz alleged common law fraud and conspiracy. In response, the defendants moved to dismiss the complaint, arguing that the action was barred by the release agreement and by the applicable statute of limitations. The district court found that the releases did not foreclose Finz from bringing the action, since Finz claimed that he was fraudulently induced to enter the agreement and sign the releases. Additionally, the district court denied the defendants' motion to dismiss on statute of limitations grounds, concluding that it could not rule on this claim until discovery was conducted. Thus, the district court entered an order denying defendants' motion.

Subsequently, the defendants moved for reconsideration of the court's order and the district court granted the motion. On reconsideration, the district court found that when he executed the release, Finz was of the belief that he was covered under the firm's plan. Nevertheless, he executed the release in return for substantial consideration. Thus, the district court found that because Finz did not enter into the agreement as a result of defendants' representations, he could not now argue that his waiver was

negated by his discovery that he probably had been entitled to plan benefits. The court also found that Finz' common law fraud and conspiracy claims were meritless. Consequently, the court granted the defendants' motion for summary judgment and dismissed the complaint.

This appeal followed.

DISCUSSION

In reviewing a district court's grant of summary judgment, we consider whether the court below properly concluded that there existed "no genuine issue as to any material fact" and that the prevailing party was "entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). We review the district court's decision *de novo*. *See P.C. v. McLaughlin*, 913 F.2d 1033, 1040 (2d Cir. 1990).

Here, the district court determined that based on the language of the agreement, as well as the circumstances surrounding its execution, Finz had knowingly relinquished all potential ERISA claims. Essentially, the district court reasoned that the language of the agreement, stating that Finz waived all interest in employee pension funds that he "claim[ed] w[ere] in existence during the period of his employment with [defendants]," clearly indicated that at the time he signed the agreement Finz believed that he was entitled to a pension despite defendants' representations to the contrary. Thus, the district court concluded that Finz' subsequent discovery of information confirming his belief that he had been covered by the pension plan did not vitiate his waiver. We agree.

Initially, we note that defendants invite us to analyze the validity of Finz' waiver of pension benefits using a traditional contract analysis. Defendants claim that

because Finz' waiver of pension plan benefits was a part of a general settlement and release agreement signed after the parties had already ended their relationship, we should apply general contract principles to determine the waiver's effectiveness. We, like the district court, decline defendants' invitation.

The validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims. *See Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991). Because individuals waiving pension benefits claims "are relinquishing [rights] that ERISA indicates a strong congressional purpose of preserving," *id.* at 1367, we have required close inspection of the totality of circumstances surrounding a waiver of ERISA benefits. *See id.*; *see also Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Thus, we cannot conclude that merely because a pension benefit waiver is embedded within a larger agreement concluded after employment has ceased, we should review its validity under a standard that is any less strict.

We recently held in *Laniok* that an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver "is made knowingly and voluntarily." *Laniok*, 935 F.2d at 1365. In that case, we reviewed a district court's determination that no disputed issue of fact existed as to whether a tool and die worker, who had signed a waiver of pension benefits prior to joining a company, had effectively waived any right he had to a pension. We noted six factors that may be examined to determine whether a plaintiff who waives benefits covered under ERISA acted knowingly and voluntarily:

1) the plaintiff's education and business experience,
2) the amount of time the plaintiff had possession of

> or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 1368 (quoting *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989)). We recognized, however, that this list of factors was not exhaustive and that "the circumstances to which these factors apply will differ if the waiver at issue is agreed to by a prospective employee rather than a current employee." *Id.*

In this case, the district court, which issued its judgment prior to our decision in *Laniok*, considered essentially these factors and concluded that Finz' waiver was knowing and voluntary. The district court found that Finz, a former New York State Supreme Court Justice, was well-educated, understood the terms of the agreement, had ample opportunity to consider the agreement and was given substantial consideration—*i.e.*, some fraction of $75,000—to execute the waivers at issue. Moreover, the district court noted that the releases were negotiated at arms length and that there was no indication that Finz was denied the opportunity to consult with an attorney about his rights under ERISA. With regard to the completeness and accuracy of defendants' disclosure, the court concluded that Finz was fully aware of his claim against the plan. In sum, the district court found that Finz' waiver was valid.

Finz challenges this conclusion, however, contending that his waiver could not have been "knowingly" made, because defendants failed to inform him of the terms of the plan. In essence, Finz claims that the defendants' alleged failure to provide him with plan documents violated ERISA and voided his waiver. We disagree.

It is well-established that the trustees of a pension plan have an obligation to provide plan participants with summary plan descriptions upon request. *See* 29 U.S.C. § 1132(c); *see also* 29 U.S.C. § 1104. The question arises, however, whether this obligation extends to a "potential plan participant," *i.e.*, an individual, such as Finz, whose coverage is in doubt. Although ERISA does not speak to this issue directly, we believe that plan trustees have a general obligation to provide potential plan participants who request plan descriptions with adequate information about the plan. *Cf. Gaynor v. Ephrata Community Hosp.*, 690 F. Supp. 373, 379 (E.D. Pa. 1988). Because "[t]he primary purpose of [ERISA] is the protection of individual pension rights," H.R. Rep. No. 533, 93rd Cong., 2d Sess. 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, it is only logical that a pension plan's trustees owe at least some duty to a potential plan participant to facilitate the determination of whether he or she has rights under the plan.

Based on the allegations of the complaint, we can surmise that defendants, by repeatedly ignoring Finz' requests for plan documents, shirked their responsibility. Nevertheless, the district court concluded that "to the extent Finz was not adequately informed of the details of the ERISA plan, he waived his right to be so informed when [he] enter[ed] into the settlement agreement." We agree with the district court's determination that in this case, defendants' failure to provide Finz with a summary plan description does not nullify his waiver.

Reviewing the circumstances here presented, we conclude that there is no question that Finz knew that he may have been covered under the plan when he relinquished his benefits. Basically, as a result of an impasse between the parties over Finz' potential plan participation, an agreement was reached such that litigation could be avoided. As is evidenced by the language of the agreement itself, Finz understood that his waiver would settle the parties' dispute over his coverage under the plan. The agreement states:

> As a consequence of the dispute which exists *based upon the claims made by [Finz] and the denials of those claims by [Julien, Schlesinger,] J S & F and J & S* as set forth in this paragraph, the aforenamed [Julien, Schlesinger,] J S & F and [Finz] hereby resolve, settle and compromise their differences as evidenced by the general releases executed by [Finz] and the remaining parties to this Agreement as consideration therefore, annexed hereto as Appendix "A."

Agreement ¶ 8 (emphasis added). Indeed, at a related proceeding in 1990, Finz testified that he left the firm as a result of a dispute over his pension benefits, suggesting that he never accepted defendants' representations and in fact believed that he was covered by the plan. Thus, Finz cannot now claim that the revelation of the check to Wolin—which to his mind confirmed his belief as to his eligibility for plan participation—completely negates his waiver.

As we held in *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527 (2d Cir. 1985), a plaintiff who has settled a claim involving fraud may not subsequently assert that he or she is not bound by the settlement because the extent of the fraud was not fully disclosed.

Although *Bellefonte* did not involve an ERISA based claim, we nevertheless believe that it is fully applicable to this situation. Finz, who at all times believed that defendants were misrepresenting his entitlement to benefits, should not be permitted to strike a better bargain at this late date by claiming that he signed the agreement in reliance on defendants' misrepresentations. *Cf. Bormann*, 875 F.2d at 404.

We do not intend to suggest that a plan trustee's failure to turn over requested plan documents to a potential participant could never, in and of itself, nullify a waiver executed by a potential plan participant. Where, for example, application of the *Laniok* factors indicate that there is a great disparity in the education or the bargaining power of the parties, the plan trustee's failure to provide a potential participant with requested information could be dispositive. Indeed, we believe that once a potential plan participant demands a summary plan description from a plan trustee, a heavy burden should be placed on the trustee to show whether the information was provided and, if it was not, to give a detailed explanation why it was not furnished. Here, however, defendants' failure to provide Finz with details of the pension plan is not dispositive, since it is clear that Finz, an astute lawyer, knew exactly the bargain he was making. We therefore agree with the district court's determination that Finz' waiver of any claim to benefits under the pension plan is valid, thus depriving him of any ERISA-based cause of action.

Finally, Finz contends that the district court erred by addressing the merits of his pendent state law claims, even though it dismissed his federal cause of action. We disagree. A district court's decision to retain jurisdiction over a pendent state claim, once it has determined that the underlying federal claim should be dismissed, is reviewed under an abuse of discretion standard. *See Carnegie Mel-*

lon University v. Cohill, 484 U.S. 343, 350 n.7 (1988); *Mayer v. Oil Field Sys. Corp.*, 803 F.2d 749, 757 (2d Cir. 1986); *see also McLearn v. Cowen & Co.*, 660 F.2d 845, 850 (2d Cir. 1981) (Lasker, *J.*, concurring). We review such decisions by considering whether judicial economy, convenience, fairness and comity require a different result. *See Carnegie Mellon*, 484 U.S. at 350 n.7.

Here, the district court's decision on the ERISA cause of action involved findings which related to Finz' common law claims. It would have thus been inefficient for the district court not to have addressed the merits of the state law issues. Accordingly, we do not believe that the district court abused its discretion in this regard.

CONCLUSION

We have examined all of Finz' remaining arguments and find them to be without merit. Thus, based on the foregoing, we affirm the judgment of the district court.

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MEMORANDUM ENDORSEMENT

Finz v. Schlesinger, et al., 90 Civ. 2685 (KC)

Plaintiff Leonard L. Finz brings this action against, inter alia, Julien and Schlesinger, P.C. (his former law firm), Stuart A. Schlesinger (one of the firm's partners), and the Julien and Schlesinger, P.C. Employees Retirement Fund, claiming that he was deprived of his pension benefits in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. In addition, Finz has pleaded common law fraud and conspiracy claims. Defendants move to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment pursuant to Rule 56.[1] Defendants also move to dismiss pursuant to Rule

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[1]Because we consider matters outside the pleadings, we treat defendants' motion as one for summary judgement.

9(b) for failure to plead fraud with particularity. For the reasons set forth below, the motions are denied.

Finz, a practicing attorney and former New York State Supreme Court Justice, was employed as an attorney at defendants' law firm from 1977 to 1984. On April 10, 1984, Finz left defendants' firm, in whole or in part because of his dispute with defendants regarding his alleged pension benefits under ERISA, which are the subject of his complaint. On May 4, 1984, Finz and defendants signed an "Agreement", dated May 4, 1984, (attached as Exhibit B to Affidavit of Stuart A. Schlesinger, sworn to on June 11, 1990 ("Schlesinger Aff."). Pursuant to the agreement, Finz signed general releases in favor of the defendants, releasing them from "all actions [or] causes of action" he had against them. Schlesinger Aff. Exhibit C.

Defendants argue that Finz' complaint is barred by

the settlement agreement and releases. Finz alleges, however, that the releases signed by him regarding his ERISA claims are "void, unenforceable and invalid" (Rule 3(g) Counter-Statement ("Pltf. 3(g)"), ¶ 1) because the defendants fraudulently induced him into signing the releases. Finz asserts that defendants falsely claimed that he was not covered under the plan. He supports this claim with reference to a check he discovered in July, 1989 drawn on the account of the "Julien & Schlesinger, P.C., Employees Retirement Fund" to Michael D. Wolin. (See Affidavit of Leonard L. Finz, sworn to on July 9, 1990 ("Finz Aff."), Exhibit A.) Wolin, another former attorney at Julien and Schlesinger, left the firm with Finz to establish a partnership with him. Like Finz, Wolin signed general releases of his ERISA claims against defendants on May 4, 1984, apparently leading Finz to believe that Wolin, like himself, was not coverred under the plan.

Upon sending the check, Finz "learned that Mr. Wolin had been untruthful and expressly misled [him] to the advantage of the defendants, with whom he enjoyed a close relationship." Finz Aff. at 10. Finz also realized, he asserts, that "the defendant[s] had fraudulently concealed the fact that there was a plan in which I was, or should have been a participant under ERISA." Id.[2]

In arguing that Finz's complaint is barred by the agreement and releases, defendants fail to recognize that an alleged fraudulent denial of participation in a plan is fundamentally different from a denial in good faith,

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[2]In addition to alleging that defendants fraudulent concealed Wolin's participation in the plan, Finz asserts that defendants "kept him in the dark" about his rights under the plan. He charges the defendants with violating their duty to disclose to him the terms of the pension plan, despite his demands before and after signing the releases for copies or summary descriptions of the plan. Finz also alleges that defendants failed to file with the Department of Labor a summary description of the plan, as assertedly required by an unspecified provision of ERISA, further thwarting his efforts to obtain information about the plan.

grounded in reasoned interpretation and application of the terms of the plan. Finz alleges that he relied on defendants' representations that he was not covered under the plan, assuming that those representations were made in good faith. He alleges further that he relied on the representation that Wolin was not covered under the plan. The check to Wolin suggests, however, that defendants may have been falsely concealing the fact that Finz was covered under the plan. Bacause Finz was not aware at the time he signed the agreement and releases of the alleged misrepresentations by the defendants and of the alleged fraud surrounding the check to Wolin, Finz's complaint is not barred by the agreement and releases. See, e.g., Irving Trust Co. v. Deutsch, 73 F.2d 121, 126 (2d Cir. 1934) (general release executed in settlement of contract claims did not bar suit for unreleated, unknown fraud claims), cert. denied, 294 U.S. 708 (1935) (cited in

Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528 (2d Cir. 1985)).

Defendants also argue that Finz's ERISA claims are time-barred. Although Finz does not specify which provision of ERISA gives rise to his cause of action for benefits, it is reasonable to assume that he seeks to enforce his rights under 29 U.S.C. § 1132, which allows a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, [or] to enforce his rights under the terms of the plan." Because ERISA does not provide a statute of limitations applicable to claims under Section 1132, "the controlling limitations period is that specified in the most nearly analogous state limitations statute." Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir.), cert.

denied, 464 U.S. 829 (1983). Thus, the six-year limitations period prescribed by Section 213 of New York's Civil Practice Law and Rules (McKinney 1990) controls. Id.[3] Moreover, "[a] plaintiff's ERISA cause of action accrues, and the six-year limitations period begins to run "when there has been 'a repudiation by the fiduciary which is clear and made known to the beneficiaries.'" Id. (citations omitted).

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[3]Finz attempts to rely on Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989) for the proposition that the statute of limitations set forth in 29 U.S.C. §1113 applies to his ERISA claims. Diduck and Section 1113 are inapposite, however, for they apply to a claim of breach of fiduciary duty brought by or on behalf of a plan against the plan administrator or trustee. When a beneficiary brings a private cause of action under Section 1132 against a fiduciary for breach of fiduciary duty under Section 1104, see Bird v. Shearson Lehman/American Express, Inc., 871 F.2d 292 (2d Cir.), vacated on other grounds, 110 S.Ct. 225 (1989), courts follow the Miles rule of borrowing the statute of limitations for the most nearly analogous state case of action. See, e.g., Larsen v. NMU Pension Trust, 902 F.2d 1069, 1073 (2d Cir. 1990); Valle v. Joint Plumbing Indus. Bd., 623 F.2d 196, 202 n.10 (2d Cir. 1980); Dameron v. Sinai Hosp., 815 F.2d 975, 981 (4th Cir. 1987).

Finz filed the complaint in this action on April 20, 1990. Contending that Finz knew defendants had repudiated his ERISA claims by April 10, 1984, the date he left the firm,[4]defendants argue that Finz filed his complaint ten days late. Finz counters, however, that he and the defendants were actively negotiating his ERISA claims up until the time he (and Wolin) signed the agreement and releases on May 4, 1984. Finz therefore argues defendants did not clearly repudiate his ERISA claims until May 4, 1984. Because it is not clear when defendants finally repudiated Finz's ERISA claims, defendants' motion to dismiss Finz's ERISA claims on statute of limitations grounds is denied with leave to renew after discovery is completed.

As to Finz's common law claim for fraudulent

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[4]See Testimony of Leonard L. Finz in Brown v. Metro. Transp. Auth. (Schlesinger Aff. Exhibit D) (Finz states that he left defendants' firm "[w]hen the pension that [he] was entitled to was taken away from [him]").

inducement of contract, New York's six year period of limitations for fraud applies. Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 748 (2d Cir. 1979). Thus, the period of limitations is six years from accrual, at the time of execution of the contract, of the cause of action, or two years from discovery of the fraud, whichever is longer. Ply*Gem of Laurel, Inc. v. Lee, 91 A.D. 2d 513, 456 N.Y.S. 2d 382, 383 (1st Dep't 1982); N.Y. Civ. Prac. L. & R. §§ 203 (a), (f) and 213(2), (8) (McKinney 1990). Because Finz's complaint was filed within six years of the signing of the contract, his fraud claim is timely.

Finally, defendants argue that Finz's complaint must be dismissed, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, for failure to plead fraud with particularity. Because defendants are sufficiently on notice of the grounds for Finz's claims, the motion to dismiss

under Rule 9(b) is denied.

Accordingly, defendants' motions are in all respects denied. The parties are directed to appear before the Court for a status conference on January 14, 1991 at 11:40 a.m. in Courtroom 312.

SO ORDERED.

KENNETH CONBOY, U.S.D.J.

Dated: New York, New York
December 10, 1990

MEMORANDUM ENDORSEMENT

Finz v. Schlesinger, et al., 90 Civ. 2685 (KC)

Defendants move for reconsideration of this Court's order dated December 10, 1990, arguing that the Court failed to consider their contention that plaintiff Leonard L. Finz, by his own admissions, did not rely on defendants' alleged fraudulent concealment of his entitlement to benefits under the Julien & Schlesinger Employee Retirement Fund. In the May 4, 1984 agreement Finz signed, settling his claims with the defendants, Finz stated, in pertinent part:

> [Plaintiff] states that to his knowledge and during or prior to the period of his employment with [defendants], he was neither issued, nor did he receive any stock interest in the "JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard tro the firms of [defendants], which [plaintiff] claims was in existence during the period of his employment with [defendants] and as such is or was entitled to the benefits thereunder

provided as a covered employee.

Agreement, dated May 4, 1984 (attached as Exhibit B to Affidavit of Stuart A. Schlesinger, sworn to on June 11, 1990 ("Schlesinger Aff."). Thus, defendants assert, even if defendants concealed any payment to Wolin or attempted to conceal Finz's entitlement to benefits, the settlement agreement leaves no doubt that Finz did not believe defendants' assertions that Finz was not entitled to ERISA benefits.

Defendants' motion for reconsideration is granted, and, upon reconsideration, we agree with the defendants. Finz contends that defendants defrauded him by denying his eligibility for ERISA benefits, but Finz, however, did not believe the defendants. As he admitted in the Agreement, he believed, despite defendants' alleged misrepresentations, that he was entitled to benefits under defendants' retirement plan. Notwithstanding that belief,

Finz, like any settling claimant, voluntarily waived his claim as part of the settlement agreement. Because Finz cannot establish reliance upon defendants' alleged fraud, defendants are entitled to summary judgment on Finz's fraud claim. See, e.g., Rosen v. Spanierman, 894 F.2d 28, 33-34 (2d Cir. 1990); Apex Oil Co. v. Belcher Co. of New York, 855 F.2d 997, 1008-09 (2d Cir. 1988).

In addition to his argument that he was fraudulently induced into settling his claims against the defendants, Finz argues that the agreement and releases are void and unenforceable because defendants breached their fiduciary duty, as ERISA trustees, to negotiate settlements and releases in good faith. Finz relies primarily on Gaynor v. Ephrata Community Hospital, 690 F. Supp. 373 (E.D. Pa. 1988), in which the court assumed, for purposes of deciding the motion before it, that a release of past pension benefits could be valid only if it met certain "strict

standards" and if "the fact of the employee's participation [was] disputed in good faith by the employer." Id. at 381. The court imposed these special requirements on releases or waivers by an employee of his or her rights under ERISA because of (1) the duty of a fiduciary of a pension to act in the interests of beneficiaries of the plan (see 29 U.S.C. § 1104 ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries")), and (2) the nonforfeiture provisions of Section 1053 (see 29 U.S.C. §1053(a) ("[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age")). These provisions, the court, observed, "evidence a congressional intent to protect employees from improvidently bargaining away participation rights." Id. at 381-82.

Although the Gaynor court's reliance on Section

retirement benefit is nonforfeitable upon the attainment of normal retirement age")). These provisions, the court, observed, "evidence a congressional intent to protect employees from improvidently bargaining away participation rights." Id. at 381-82.

Although the Gaynor court's reliance on Section 1053(a), is perhaps misplaced, Gaynor simply applies to ERISA settlements the principle that where a fiduciary relationship exists between the parties, transactions between them must be carefully scrutinized. See, e.g., Benson v. HMJ Securities Corp., 683 F. Supp. 359, 375 (S.D.N.Y. 1988); Gordon v. Bialystoker Center and Bikur Cholim Inc., 45 N.Y.2d 692, 698-89, 412 N.Y.S.2d 593, 596-97 (1978). It is therefore useful to consider the factors set forth in Gaynor for evaluating the enforceability of the releases: (i) whether the release is in writing; (ii) whether the release is clear and specific; (iii) whether there

was a full and accurate disclosure of the rights being released; (iv) whether the employee was represented by counsel; (v) whether there was a real opportunity for negotiation and (vi) the adequacy of the consideration given for the release. Gaynor, 690 F.2d at 382.

These factors parallel the factors which the Second Circuit has enumerated for determining whether, under the totality of the circumstances, a waiver or release of a claim under the Age Discrimination in Employment Act ("ADEA") is knowing and voluntary, see Bormann v. AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir. 1989), and which other courts have applied in evaluating the validity of waivers or releases of ERISA claims. See,e.g., Lanick v. Advisory Committee of the Brainard Mfg. Co. Pension Plan, 753 F. Supp. 1115, 1121 (W.D.N.Y. 1990) (factors to consider include (1) clarity of waiver agreement, (2) sophistication of employee, (3)

amount of time employee has possession or access to waiver agreement before signing it, and (4) whether employee had opporotunity to consult with attorney); Joseph v. Chase Manhattan Bank N.A., 751 F. Supp. 31, 33-34 (E.D.N.Y. 1980).

The factors set forth in Gaynor are considerations which "would normally be taken into account" in determining whether "the entirety of the facts andc circumstances surrounding [the] execution" of a release supports its validity. Gaynor, 690 F. Supp. at 382. Thus, the list of factors is not exhaustive or exclusive. See also Lanick, 753 F. Supp. at 1121 ("While each of these factors is relevant in assessing the validity of a givn waiver, no one factor need predominate nor must eqach be considered.");cf. Bormann, 875 F.2d at 403 (factors comprise only some of those which can be considered in a totality of the circumstances test).

Turning to the six factors in Gaynor, we find that the releases Finz sisgned are in writing and are clear and specific. As a practicing attorney, who spent twelve years as a state court judge, Finz was adequately aware of his legal rights. Even if he was unfamiliar with ERISA, there is no indication that he was denied the opportunity to consult with counsel. Although Finz contends that the releases were not negotiated, there was clearly the opportunity for negotiation, at least from the time Finz left defendants' firm in the beginning of April to the signing of the releases in early May. Thus, the only factors which there is any question are whether there was a full and accurate disclosure and whether the consideration given for the release was adequate.

As to whether defendants' disclosure was full and accurate, Finz argues that the defendants violated their fiduciary duty to disclose to him the terms of the pension

plan, despite his demands before and after signing the releases for copies of summary descriptions of the plan. Finz also alleges that defendants failed to file with the Department of Labor a summary description of the plan, further thwarting his efforts to obtain informationn about the plan. These arguments essentially restate Finz's ERISA claims and his claim that defendants fraudulently induced him into settling his ERISA claims. We find that, to the extent Finz was not adequately informed of the details of the ERISA plan, he waived his right to be so informed when entering into the settlement agreement.

As indicated by the language ofr the settlement agreement and Finz's own testimony in Brown v. Metropolitan Transportation Authority (Schlesinger Aff. Exhibit D)(Finz left defendants' firm "[w]hen the pension that (he) was entitled to was taken away from [him]"), Finz was aware of his claium against the plan. More

imp;ortantly, Finz hsad demanded a summary description of the plan before entering into the settlement agreement. Complaint Par. 69. Thus, one of the rights Finz released in settling with defendants was the right to be better informed. Insatead of pressing his right to more information, Finz settled his claims against the defendants. Finz's claim that defendants falsely denied his participation in the plan is essentially an attempt to relitigate the merits of the dispute he settled with the defendants, without insisting on full and accurate disclosure, in 1984.

Finz's argument that he did not receive adequate consideration for signing the releases is without merit. According to the settlement agreement, which also resolved, in addition to the parties' dispute over Finz's ERISA benefits, the parties' dispute about Finz's asserted ownership of a stock or equity interest in defendantgfs'

firm, Finz received $75,000[6] at the time of the execution of the agvreement and the signing of the releases. Agreement Par. 11. Finz avers that this $75,000 represents "the balance of the bonus promised to [him] om December 1983 [by defendants] and not . . . underlying consideration for anything in the May 4, 1984 agreement." Finz Aff. at 4 (emphasis in original). Furthermore, Finz states, "the corrrectness of this statement can be verified during discovery by reference to defendant's accounting records."

Finz's efforts to avoid the plain and unambiguous meaning of the settlement agreement by resorting to extrinsic evidence is unavailing. In interpreting a contract, "the court is required to discern the intent of the parties to

---

[6] Finz does not contend that the $75,000 was not adequate consideration for settling his disputes with the defendants. He contends only that the $75,000 was not consideration at all. As we have indicated, we reject that contention.

the extent their intent is evidenced by their written agreement. . . Where the parties' intent is 'clearly and unambiguously set forth, effect must be given tyo the intent as indicated by the language used." International Klafter Co. v. Continental Casualty Co., 869 F.2d 96, 99 (2d Cir. 1989) (quoting Slatt v. Slatt, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646 (1985). No parol evidence or extrinsic evidence is admissable. Id. at 100. The aqgreement clearly contemplates that, as part of the settlement of the disputes between the parties, Finz would receive $75,000. There is no mention in the settlement agreement of Finz's claim to a bonus assertedly promised to him. We conclude that Finz received $75,000 as consideration for releasing his ERISA claims and his stock or equity interest.

Defendants argue that Finz also received as a result of the agreement, the "[cases which Finz claims (he)

brought into (Julien & Schlesinger)"(see Agreement Par. 12), and assumed the lease of, with an option to purchase, a Mercedes automobile (Id. Pqar. 19). Finz attempts to devalue these partes of the agreement. He states that the reference to hiw caseload simply involved cases which defendants would be "duty bound to turn over" once valid stipulations of substitution of attorneys were executed. Finz Aff. at 6. He further states that he took over the lease of the Mercedes, on which $27,000 in monthly payments remained, essentially as a favor to Schlesinger. Id at 5. Again, this extrinsic information is not set forth in the settlement agreement, the language of which suggests that the Mecedes lease and the caseload were part and parcel of the consideration Finz received for signing the releases. In any event, the $75,000 referred to above represents valuable consideration.

We conclude, from the totality of the

cirdcumstances, that the settlement and releases entered into by Finz are valid and enforceable, and that they bar Finz's claims against the defendants.[7] Defendants' motion for summary judgment is granted, and the Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

KENNETH CONBOY, U.S.D.J.

Datted: New York, New York
June 6, 1991.

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[7] The agreement and releases extinguish all of Finz's ERISA claims against the defendants. The general releases declare that Finz agreed to release the defendants from "all actions [or] causes of action." Schlesinger Aff. Exhibit C. The settlement executed by the parties unambiguously reflects the same understanding: it specifically refers to Finz's claim that he "is or was entitled to the benefits [under the pension plan] as a covered employee" but that "[a]s a consequence of the dispute" Finz would execute the general releases in favor of the defendants. The language of the agreement and the releases thus indicates that Finz had made ERISA claims for, inter alia, pension benefits, that his claims were disputed by the defendants, and that the parties decided to settle their differences by entering into a settlement agreement.

(2)

No. 91-1904

Supreme Court, U.S.
FILED
JUN 26 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONARD L. FINZ,

Petitioner,

—against—

STUART A. SCHLESINGER; JULIEN, SCHLESINGER AND FINZ, P.C.; JULIEN AND SCHLESINGER, P.C.; JULIEN AND SCHLESINGER; STUART A. SCHLESINGER, doing business as Julien and Schlesinger, P.C.; THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND; THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST; PLAN DOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GARY P. NAFTALIS
Counsel of Record
JONATHAN M. WAGNER
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals violate the Equal Protection Clause of the United States Constitution when it took into account petitioner's education and business background in determining whether petitioner's waiver of his ERISA rights was knowing and voluntary?

PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption. Respondents have no parent companies, subsidiaries, or affiliates.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states:

> No State . . . shall . . deprive any person of life, liberty or property, without due process of law; nor deny within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

The 1984 Settlement Between Petitioner and Respondents

Petitioner Leonard Finz is an attorney and former New York State Supreme Court Justice. From January 1978, when he left the bench, until April 10, 1984, petitioner was an attorney at the New York City law firm of respondent Julien & Schlesinger. Petitioner alleges that he was induced to join the firm because he wanted a guaranteed pension. (Pet. App. 42).[1/]

In April 1984, a dispute erupted between petitioner and Julien & Schlesinger concerning petitioner's pension rights: petitioner claimed he was entitled to pension benefits, while respondents insisted he was not. Accordingly, on April 10, 1984, petitioner left the firm. Petitioner immediately set up practice with Michael Wolin, at the time another Julien & Schlesinger attorney. (Id.).

More than three weeks later and to avoid litigation, petitioner and Mr. Wolin on one hand and respondents on the other settled all their differences. On May 4, 1984, they signed a settlement agreement and general releases. (Id. at 43).

1/ "Pet. App." references the appendix to the Petitioner's Brief.

The settlement agreement specifically states that petitioner believed he was wrongfully deprived of his pension benefits -- the very claim he seeks to prosecute in this action -- but nevertheless agreed to release respondents of this and all claims in exchange for substantial consideration, including $75,000. (Id. at 43-44).

The settlement aggreement declared:

> [Petitioner] states that to his knowledge and during or prior to the period of his employment with [respondents], he was neither issued, nor did he receive any stock interest in the "JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [respondents], which [petitioner] claims was in existence during the period of his employment with [respondents] and as such is or was entitled to the benefits thereunder provided as a covered employee....

(Id. at 43) (emphasis added).

> [Respondents] deny that [petitioner] is entitled to any stock interest or equity interest whatsoever with regard to the "JULIEN & SCHLESINGER EMPLOYEE RETIREMENT FUND DATED JUNE 11, 1974" or any other pension or profit sharing plan which may have existed or any parties claim to have existed with regard to the firms of [respondents] as hereinabove claimed by [petitioner] in this paragraph.

(Id. at 21). The settlement agreement then explicitly disposed of these claims, requiring the execution of a general release in favor of respondents:

> As a consequence of the dispute which exists based upon the claims made by [petitioner] and the denials of those claims by [respondents] as set forth in

> this paragraph, the aforenamed [petitioner and respondents] hereby resolve, settle and compromise their differences as evidenced by the general releases executed by [petitioner] and the remaining parties to this Agreement as consideration therefore, annexed hereto as Appendix "A."

(Id. at 43).

Petitioner's Allegations of Concealment

Despite the plain language of the settlement disposing of his ERISA claims, petitioner in this lawsuit seeks to revive those very claims put to rest in the 1984 agreement. He has asserted that he was unlawfully deprived of his pension rights in violation of the Employee Retirement Income Securities Act, 29 U.S.C. §§ 1001 et seq. (1988) ("ERISA"). Specifically, petitioner asserts that respondents wrongfully led him to believe that he was not covered by the Julien & Schlesinger retirement plan and thus fraudulently induced him to sign a waiver releasing them from liability for payments under the plan. (Id. 41-42). Petitioner has also asserted a common law claim of fraud.

The Decision by the District Court

After initially denying respondents' summary judgment motion, on June 6, 1991 the District Court granted respondents' motion for reargument and, upon reconsideration, granted summary judgment, holding that the parties' 1984 settlement and releases barred petitioner's claims. (Id. at 62-75).

First, the Court dismissed petitioner's fraud claim: "[a]s [petitioner] admitted in the [settlement] Agreement, he believed, despite [respondents'] alleged misrepresentations, that he was entitled to benefits under [respondents'] retirement plan. Notwithstanding that belief, [petitioner] like any settling claimant, voluntarily waived his claim as part of

the settlement agreement. Because [petitioner] cannot establish reliance upon [respondents'] alleged fraud, [respondents] are entitled to summary judgment on [petitioner's] fraud claim." (Id. at 63-64).

As for petitioner's ERISA claim, at petitioner's urging the District Court applied a "totality of circumstances" test rather than ordinary contract principles in determining whether petitioner's waiver was effective. (Id. at 64-75). See Laniok v. Advisory Comm., 935 F.2d 1360 (2d Cir. 1991). The District Court held that the 1984 settlement met that standard. The settlement agreement and releases were "in writing and are clear and specific" (A. 69), and petitioner received adequate consideration for relinquishing his ERISA claims. (Id. at 71-74). Additionally, "[a]s a practicing attorney, who spent twelve years as a state court judge, [petitioner] was adequately aware of his legal rights. Even if he was unfamiliar with ERISA, there [was] no indication that he was denied the opportunity to consult with counsel." (Id. at 69).

On the issue of whether respondents' disclosure was "full and accurate," the Court held that "to the extent [petitioner] was not adequately informed of the details of the ERISA plan, he waived his right to be so informed when entering into the settlement agreement," and that, as reflected in petitioner's own testimony in a related matter as well as the settlement agreement itself, "[petitioner] was aware of his claium [sic] against the plan." But "[i]nstead of pressing his right to more information, [petitioner] settled his claims against the [respondents]," thereby precluding revival of his ERISA claim in this action. (Id. at 70-71).

The Decision by the Court of Appeals

On February 25, 1992, the Second Circuit Court of Appeals unanimously affirmed the lower court's grant of summary judgment dismissing petitioner's complaint. (Id. at 40-51).

The Panel concluded that a "totality of circumstances" test should apply in determining whether petitioner's ERISA waiver was made "knowingly and voluntarily." (Id. at 46). The criteria under this test, as elucidated by the Panel, include:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 46-47. See also Laniok, 935 F.2d at 1365.

Although petitioner alleged that his waiver was not made knowingly and voluntarily, the Panel held otherwise. It cited the language of the settlement agreement, which specifically stated that petitioner knew of his ERISA rights but nevertheless agreed to waive them: "[Petitioner], who at all times believed that [respondents] were misrepresenting his entitlement to benefits, should not be permitted to strike a better bargain at this late date by claiming that he signed the [settlement] agreement in reliance on [respondents'] misrepresentations." (Id. at 50).

The Court also held that respondents' failure to provide petitioner with details concerning the pension plan "is not dispositive, since it is clear that [petitioner], an astute lawyer, knew exactly the bargain he was making." (Id.).

THE REASONS FOR DENYING THE WRIT

Petitioner asserts that, in assessing the effect of his ERISA release, the Court below violated the Equal Protection Clause by "creating and distinguishing a new class of employees to whom ERISA disclosure requirements do not provide protection, i.e. those employees who are 'well educated.'" (Pet. Br. at 5-6). But petitioner is mistaken: because the decision below was entirely correct and does not conflict with any decision of this Court or any Court of Appeals, the petition presents no special or important issue worthy of a writ of certiorari.

I. The Court of Appeals Decision was Correct

As a preliminary matter, and in framing the issue for this Court, petitioner has misstated the Court of Appeals' holding. Rather than improperly carving out any sub-class of "well educated" employees, the Court merely held that petitioner's education and business experience was one of a half-dozen factors that the Court could consider in determining the effect of the ERISA settlement agreement. Ironically, in its brief to the District Court and Court of Appeals below, petitioner urged that the Court apply this "totality of circumstances" test -- including the factor of an employee's education and business experience -- rather than a less stringent contract analysis proposed by respondents.

In taking into account petitioner's background and education under the totality of circumstances test, the Court below clearly did not violate the Equal Protection Clause.

Since the issue of the validity of ERISA waivers implicates no suspect class and impinges on no constitutionally protected right, the Court of Appeals' decision is reviewed under the deferential "rational basis" Equal Protection scrutiny. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). As this Court recently put it:

> we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.

Pennell v. City of San Jose, 485 U.S. 1, 14 (1988), quoting Vance v. Bradley, 440 U.S. 93, 97 (1979).

Under this standard, "which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," as long as the classification "'has some reasonable basis, it does not offend the Constitution.'" Stanglin, 490 U.S. at 26 (citation omitted). See also Allegheny Pittsburgh Coal Co. v. Coventry Comm'n, 488 U.S. 336, 344 (1989) (state classification will be upheld under Equal Protection Clause if it is "neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy") (citation omitted).

It was not arbitrary or unreasonable for the Court below to consider petitioner's background as an attorney and former State Court Justice. Quite obviously, the intelligence and business background of an employee is a critical factor in assessing whether he is aware of what he is doing in giving up ERISA rights. In fact, this factor is particularly apt in this case since, as a lawyer and veteran jurist, petitioner was uniquely positioned to understand the legal effect of a settlement and waiver agreement on his subsequent ability to revive his ERISA claims.

The Supreme Court has repeatedly held that even when assessing the effectiveness of waivers of fundamental constitutional rights -- which triggers strict scrutiny under the Equal Protection Clause -- the education of the party waiving the right can and should be considered. For example, in determining whether statements obtained during custodial

interrogation are admissible against the accused and whether the accused has knowingly and voluntarily waived his constitutional right to remain silent and to have assistance of counsel, the Court has held that the totality of circumstances surrounding the interrogation must be considered. Miranda v. Arizona, 384 U.S. 436 (1966). In Fare v. Michael C., 442 U.S. 707, 725 (1979), this Court specifically held that in the case of a juvenile's waiver of those constitutional rights, "[t]he totality approach permits -- indeed, it mandates -- inquiry into all the circumstances surrounding the interrogation," including "evaluation of the juvenile's age, experience, education, background, and intelligence. . . ." (emphasis added). See also Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (in determining whether a suspect's confession was voluntary, the education and intelligence of the suspect should be considered).

Since this Court has approved consideration of a party's educational background in assessing waivers of fundamental rights -- where the strict scrutiny Equal Protection test applies -- a fortiori, the Court below was on firm constitutional footing in taking into account petitioner's position as an attorney and former State Supreme Court Justice in assessing his waiver of rights that are merely statutory. On this ground alone, the writ should be denied.

II. There is no Conflict in the Circuits

A second and independent reason for denying the writ is that there is no conflict in the Circuits as to whether it is a violation of the Equal Protection Clause to consider an employee's education and business background in determining the effect of a waiver of ERISA or similar statutory rights.

A number of Circuit Courts have concluded that an employee's education and background are part of the totality of circumstances in evaluating the validity of an ERISA waiver. See, e.g., Laniok v. Advisory Committee, 935 F.2d 1360, 1367-68 (2d Cir. 1991); Leavitt v. Northwestern Bell Telephone Co., 921 F.2d 160, 162 (8th Cir. 1990).

In similar fashion, four Circuit Courts have included this factor as part of the totality of circumstances in assessing waivers of age discrimination claims. See Gormin v. Brown-Forman Corp., 1992 U.S. App. LEXIS 13379 (11th Cir. June 15, 1992); O'Hare v. Global Natural Resources, 898 F.2d 1015, 1017 (5th Cir. 1990); Bormann v. AT&T Communications, 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989); Coventry v. United States Steel Corp., 856 F.2d 514, 523 (3d Cir. 1988). See also Stroman v. West Coast Grocery Co., 884 F.2d 458, 462-63 (9th Cir. 1989) (applying totality of circumstances test, including factor of employee's education and business background, to waiver of Title VII claim), cert. denied, ___ U.S. ___, 111 S. Ct. 151 (1990); Torrez v. Public Service Co., 908 F.2d 687, 689 (10th Cir. 1990) (same).

In none of these cases did any Court of Appeals conclude that consideration of an employee's education violated the Equal Protection Clause -- since, as set forth at pages 6-8 above, it clearly does not. Given petitioner's failure to demonstrate any conflict among the Circuit Courts -- the principal ground for granting certiorari, see Supreme Court Rule 10.1(a) -- a writ in this case is entirely unwarranted.[2/]

2/ It is also worth noting that even though the District Court cited petitioner's education and position as an attorney in holding that the ERISA waiver was valid, petitioner never raised his Equal Protection claim before the Court of Appeals. This Court has long applied the principle that, only in exceptional circumstances not found here, it will not review an issue that was not raised properly below -- another ground for denying the writ. See Delta Air Lines v. August, 450 U.S. 346, 362 (1981) (the "question [of the district judge's abuse of discretion] was not raised in the Court of Appeals and is not properly before us"); Duignan v. United States, 274 U.S. 195, 200 (1927) ("[i]t is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY P. NAFTALIS
(Counsel of Record)
JONATHAN M. WAGNER
KRAMER, LEVIN, NESSEN,
KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

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Respondents.

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REPLY BRIEF

LAW OFFICES OF LEONARD L. FINZ, P.C.
Attorneys for Petitioner
NORMAN E. FROWLEY
Appellate Counsel
225 Broadway
New York, NY 10007
(212) 233-8674

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(8570—LC7-100—1992)

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REPLY BRIEF

CORRECTING RESPONDENTS' MISSTATEMENT OF THE CASE.

Respondents portray this petition as one involving the propriety of an ERISA waiver, i.e., whether it was made knowingly and voluntarily under the "totality of circumstances test" espoused in a number of Circuit Court cases. This case is not, however, as respondents portray it. This petition does not involve the "totality of circumstances test." The narrow issue for determination may be stated as follows: (1) whether Finz, as an employee, was entitled to full *disclosure* from his employer of the ERISA plan to which he belonged (including of course any benefits owed to him), or whether the disclosure requirements of the ERISA Statute did not pertain to him because he was well educated, (2) whether the failure of the plan trustees to make disclosure and their intentional concealment of the plan and benefits vitiated Finz's waiver, and (3) whether the District Court's conclusion Finz was not entitled to disclosure

because he was well educated deprived him of Equal Protection.

We have no quarrel with the notion that education and background are relevant criteria to be employed in determining whether an ERISA "waiver" is knowing and voluntary; but only where the waiver agreement is plain on its face and nothing material has been hidden or withheld from the releasor. That is to say, in the absence of fraud.

Thus, had full disclosure of the plan and the benefits available to Finz been made in this case we would agree that Finz's educational status would be properly considered on the issue of whether his waiver was knowing or voluntary.

But intelligence, most respectfully, does not connote one is clairvoyant or has the ability to invariably discern truth from lie or the capacity to know and appreciate information which has *not* been disclosed and which, instead, has been intentionally withheld from one's knowledge.

Mr. Finz could have had the Intelligence Quotient of

Albert Einstein and still have been unaware of the benefits he was waiving. Without *disclosure* even the most intelligent employee cannot be expected to make a "knowing" waiver of ERISA benefits due to him. An employee's intelligence and background should have no bearing on whether he or she is entitled to disclosure before being said to have made a knowing and voluntary waiver. Setting aside as a separate subclass of employees, those who are "intelligent," to be treated differently with respect to the disclosure requirements of ERISA than those who are not intelligent, does not serve the legitimate purpose of protecting all employees and their families from the abuses of ERISA plan trustees; the purpose of the ERISA disclosure provisions.

POINT

THE WRIT SHOULD BE GRANTED ON THE GROUND FINZ WAS DENIED EQUAL PROTECTION

The Circuit Court found that the plan trustees "by repeatedly ignoring Finz' request for plan documents, shirked their responsibility." But the Court concluded that the defendants' failure to provide Finz with a summary description did not nullify his waiver. Why? Because it was clear to the Circuit Court that Finz "an astute lawyer, knew exactly the bargain he was making." On the other hand, the Court concluded, where there is great disparity in the education or bargaining power of the parties, the plan trustee's failure to provide a potential participant with requested information could be dispositive.

A sharp distinction was drawn by the Circuit Court between "astute lawyer" type employees and those less educated; as though those with greater education somehow

know or should know more about the ERISA benefits to which they are actually entitled under their particular plan, *even in the absence of disclosure*, than those who have less education.

Given the complexity of the ERISA laws, the Circuit Court's implied conclusion that Finz "knew" the bargain he was making regarding any ERISA benefits due to him because he was intelligent, is a *non sequitur*. Intelligence is not a substitute for information. Without disclosure of what is being waived, one cannot, we submit, properly conclude a waiver was "knowing" simply because the employee waiving was "smart" or "astute" or even "genius."

The Circuit Court thus created a subclass of employees (those astute, smart, lawyer-like or intelligent ones) and treated them differently from all others with respect to the disclosure requirements of ERISA.

In light of the fact the ERISA disclosure requirements are designed to serve the legitimate purpose of protecting all

employees and their families who may be participants or beneficiaries of ERISA plans from inadvertently or improvidently bargaining away any benefits provided by those plans, it was irrational for the Court to treat certain intelligent employees differently when it comes to disclosure. Intelligent employees are entitled to just as much information about their plan as less intelligent workers. A waiver of concealed or undisclosed ERISA benefits by an intelligent employee is just as unknowing as a waiver of concealed or undisclosed ERISA benefits by a less intelligent employee.

In short, all employees are entitled to disclosure. Whether, once disclosure is had, a particular employee understands what has been disclosed and thus has "knowingly" waived, may be assessed by taking the employee's intelligence into account. But it cannot be said that a waiver in any case is knowing where the ERISA plan and benefits available have been actively concealed by the plan trustee from the employee and where the employee

otherwise has no independent knowledge of the benefits being waived.

Accordingly, we embrace the standard expressed by this Court in *Pennell v. City of San Jose*, 485 US 1, 14 (1988) quoting from *Vance v. Bradley*, 440 US 93, 97 (1979), that it will not:

> ...overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.

It was arbitrary and unreasonable for the Court below to consider petitioner's intelligence is assessing whether he was entitled to "disclosure." The failure of the trustees to disclose should have been dispositive regardless of Finz's intelligence or background as a lawyer. By depriving Finz of

the right to be "informed" through disclosure simply because he was astute, the Court deprived him of the equal protection of the Laws to which he was absolutely entitled.

Respondents cite a number of cases in their brief, which address issues *not* raised by this petition. They, for example, place substantial reliance upon *Fare v. Michael C.*, 442 US 707, 725 (1929) and *Schneckloth v. Bustamonte* 412 US 218, 226 (1973), which were concerned with waivers of constitutional rights-not with one's entitlement to be informed of one's rights before making a waiver. Perhaps the more appropriate, more analogous case therefore is *Miranda v. Arizona* and its progeny.

In addition, respondents' citation of *Laniok v. Advisory Committee*, 935 F2d 1360, 1367-68 (2d Cir. 1991); *Leavitt v. Northwestern Bell Telephone Co.*, 921 F2d 160, 162 (8th Cir. 1990), *Gorman v. Brown-Forman Corp.*, 1992 U.S. App. LEXIS 13379 (11th Cir. June 15, 1992); *O'Hare v. Global Natural Resources*, 898 F.2d 1015, 1017 (5th Cir.

1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988). See also *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462-63 (9th Cir. 1989) and *Torrez v. Public Service Co.*, 908 F2d 687, 689 (10th Cir. 1990) is misplaced.

Those cases are concerned with the determination of whether a waiver was made knowingly and voluntarily. In none of those cases was the court presented with the issue of whether the waiving party was entitled to be informed of the rights or benefits being waived. The releases reviewed in the cases cited were plain on their face. The question was whether the waiving party understood the terms of the waiver.

That issue is not presented here.

Finz never had the opportunity to assess the actual facts. It could not properly be said that he made a "knowing"

waiver of facts never disclosed to him. He was unfairly singled out by the Circuit Court for different treatment regarding disclosure than all other employees because of his "intelligence" and "astuteness." This was an irrational distinction for the Court to draw in view of the purpose of the ERISA disclosure provisions.

CONCLUSION

By intentionally withholding pension plan information from Finz and otherwise failing to disclose to Finz the details of the pension plan in which he was a participant, the plan trustees shirked their responsibility to disclose under ERISA and the ERISA waiver signed by Finz was therefore a nullity, whether Finz was well educated or not.

The writ of certiorari should be granted.

Respectfully submitted

Norman E. Frowley
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 233-8674

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